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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

RICHARD M. OCHOA, Plaintiff and Appellant, v. MTC FINANCIAL, INC., et al., Defendants and Respondents.	B253940, B257874 (Los Angeles County Super. Ct. No. KC065876)

APPEALS from a judgment and an order of the Superior Court of Los Angeles County. R. Bruce Minto, Judge. Affirmed.

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Paul Kujawsky for Plaintiff and Appellant.

Burke, Williams & Sorensen, Richard J. Reynolds, Joseph P. Buchman, and Fabio R. Cabezas for Defendant and Respondent MTC Financial, Inc.

Severson & Werson, Jan T. Chilton, and Kerry W. Franich for Defendant and Respondent Federal National Mortgage Association.

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Plaintiff Richard Ochoa sued defendants MTC Financial Inc. (Trustee Corps) and Federal National Mortgage Association (FNMA) for claims arising from the foreclosure sale of his real property. The court sustained demurrers by Trustee Corps and FNMA without leave to amend. Ochoa appealed. On appeal, Ochoa abandons his claims against FNMA. We therefore affirm the judgment in favor of FNMA. He contends, however, that he can amend his pleading to allege causes of action for slander of title and wrongful foreclosure against Trustee Corps. We disagree and affirm the court's order of dismissal.

FACTUAL SUMMARY

In 2006, Ochoa borrowed $350,000 from IndyMac Bank, F.S.B (IndyMac) and secured the debt with a deed of trust against certain real property in Pomona. The beneficiary of the deed of trust was Mortgage Electronic Registration System (MERS), "acting solely as a nominee for Lender and Lender's successors and assigns." The "Lender" was IndyMac. The original trustee was LandAmerica Southland Title. The Lender had the power to appoint successor trustees.

The deed of trust provided that "MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument."[1]

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[1] "'MERS is a private corporation that administers the MERS System, a national electronic registry that tracks the transfer of ownership interests and servicing rights in mortgage loans. Through the MERS System, MERS becomes the mortgagee of record for participating members through assignment of the members' interests to MERS. MERS is listed as the grantee in the official records maintained at county register of deeds offices. The lenders retain the promissory notes, as well as the servicing rights to the mortgages. The lenders can then sell these interests to investors without having to record the transaction in the public record. MERS is compensated for its services through fees charged to participating MERS members.' [Citation.] 'A side effect of the MERS system is that a transfer of an interest in a mortgage loan between two MERS members is unknown to those outside the MERS system.' [Citation]." (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1151.)

In July 2008, the Office of Thrift Supervision (OTS) announced that it had "closed" IndyMac and placed it under the conservatorship of the Federal Deposition Insurance Corporation (FDIC). FDIC was tasked with transferring substantially all the assets of IndyMac to a new entity, IndyMac Federal Bank, FSB (IndyMac Federal). In March 2009, OneWest Bank, FSB (OneWest) acquired the assets of IndyMac Federal.

In a writing dated August 6, 2012, MERS, "solely as nominee for [IndyMac]," assigned "all beneficial interest" in the deed of trust to OneWest. The instrument was recorded on August 16, 2012.

On August 21, 2012, OneWest appointed Trustee Corps as the trustee under the deed of trust. About two weeks later, Trustee Corps recorded a notice of default and election to sell the property under the power of sale in the deed of trust. Trustee Corps recorded a notice of trustee's sale concerning the property on January 29, 2013.

Ochoa filed a complaint on March 19, 2013, against MERS, OneWest, and Trustee Corps. He sought to enjoin the foreclosure sale, cancel his debt, and quiet title to the property, among other relief. The next day, Trustee Corps sold the property to FNMA at a nonjudicial foreclosure sale.[2] The trustee's deed was executed and recorded in April 2013.

In July 2013, Ochoa filed a first amended complaint, adding FNMA as a defendant. The first cause of action was for "Slander of Title"; the second was for "Cancellation of Cloud on Title." Ochoa alleged that the trustee's deed resulting from the foreclosure sale "was false and caused doubt to be cast on [Ochoa's] title to the property." Among other defects in the foreclosure process, he averred that Trustee Corps was not properly substituted in as the trustee and "had no authority under the deed of trust." He sought damages and the cancellation of the deed of trust and trustee's deed.

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[2] It does not appear from our record that Ochoa sought a temporary restraining order or other interim relief to prevent the foreclosure sale.

Trustee Corps filed a general demurrer to the first amended complaint in August 2013. Ochoa, who was representing himself, did not file any opposition.[3] In November 2013, the court overruled the demurrer as to the first cause of action for slander of title as moot because Trustee Corps "was not named" in that cause of action. The demurrer to the second cause of action was sustained without leave to amend. The court further ordered that Trustee Corps be dismissed with prejudice. Ochoa timely appealed from this order.

In March 2014, FNMA demurred to Ochoa's first amended complaint. The court sustained the demurrer without leave to amend and, in June 2014, entered judgment of dismissal. Ochoa timely appealed from the judgment.

In September 2014, we granted Ochoa's motion to consolidate the two appeals.

DISCUSSION

1. *Abandonment of Appeal as to FNMA*

After the foreclosure sale of Ochoa's property, FNMA filed an unlawful detainer action against Ochoa. Following a bench trial in July 2013, the court entered judgment in FNMA's favor and the appellate division of the Superior Court affirmed the judgment in August 2014.

About two weeks after the unlawful detainer trial, Ochoa filed a separate action in the Superior Court against FNMA for declaratory relief and quiet title (the quiet title action). In the quiet title action, Ochoa challenged the validity of the trustee's deed and sought to have the court declare that FNMA has no interest in the property. Ochoa alleged that FNMA had no rights under the deed of trust "because it is not a party, it is not an assignee, or successor and can't now become so because the lender of that record no longer exists as of approximately July 2009. . . ." FNMA successfully demurred to the complaint and, in June 2014, the court entered judgment in its favor. Ochoa did not appeal.

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[3] Three days before the hearing on Trustee Corps' demurrer, Ochoa filed an "Ex Parte Notice of Motion and Motion for Leave to File Second Amended Complaint." Our record does not indicate whether the court heard or ruled on this motion.

On appeal in this case, FNMA argues that Ochoa's claims are barred by principles of collateral estoppel and res judicata based upon the judgments in the unlawful detainer action and the quiet title action. FNMA supports these arguments with a motion for judicial notice of the appellate division's opinion in the unlawful detainer case and of the complaint, judgment, and Superior Court case summary in the quiet title action. We granted that unopposed motion for judicial notice.

In his reply brief, Ochoa concedes that the judgment in the quiet title action "serves to bar his attempt to assert the same claims against FNMA in the case at bench." He concludes that it "would be appropriate for this court to affirm the judgment of dismissal in favor of FNMA." Ochoa thus has abandoned his claims on appeal as to FNMA, and, on that basis, we affirm the judgment in FNMA's favor. (See *Doan v. State Farm General Ins. Co.* (2011) 195 Cal.App.4th 1082, 1090-1091, fn. 5.)

2. *Appeal as to Trustee Corps*

Ochoa does not dispute that he failed to plead facts sufficient to state a cause of action against Trustee Corps in his FAC. He asserts, however, that he can do so. We review a trial court's denial of leave to amend after sustaining a demurrer under the abuse of discretion standard. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 970-971.)[4] In applying this standard, "we decide whether there is a reasonable possibility" the plaintiff can amend to state a cause of action. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "The burden of proving such reasonable possibility is squarely on the plaintiff." (*Ibid.*)

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[4] The abuse of discretion standard is applied even when, as here, the appellant did not request leave to amend and has proposed facts and theories that were not presented to the trial court. (*Connerly v. State of California* (2014) 229 Cal.App.4th 457, 460.) As the *Connerly* court noted, finding an "abuse[] of discretion" in this situation "is arguably misleading and unfair [to the trial court]. The trial court ruled on the facts and law that were presented in the amended complaint and moving papers on the demurrer, and plaintiffs have not challenged the trial court's resolution of those issues, impliedly conceding the trial court made no mistake." (*Id.* at p. 460, fn. 1, italics omitted.) Nevertheless, we are bound to that standard of review by statute. (*Ibid.*; see Code Civ. Proc., § 472c).

A. *Wrongful Foreclosure*

Ochoa contends he can allege a claim for wrongful foreclosure against Trustee Corps. The crux of his claim is his assertion that Trustee Corps "had no right nor power to foreclose, because it was never validly appointed as trustee." According to Ochoa, "the pivotal fact in this case" is MERS's assignment of the beneficial interest in the deed of trust to OneWest in August 2012. Ochoa contends that the assignment was defective because it was made by MERS "as nominee for [IndyMac]" after IndyMac had been closed by the OTS; because IndyMac could not "convey anything" after it "ceased to exist," MERS could not assign anything as IndyMac's nominee. OneWest, he argues, therefore had no power to appoint Trustee Corps, and Trustee Corps had no power to conduct the foreclosure proceedings.

As Ochoa acknowledges, California courts have repeatedly rejected similar claims. (See, e.g., *Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497 (*Jenkins*); *Herrera v. Federal National Mortgage Assn.* (2012) 205 Cal.App.4th 1495 (*Herrera*); *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256 (*Fontenot*).)[5] In *Herrera*, the facts are strikingly similar, down to the point of involving IndyMac, IndyMac Federal, OneWest, Trustee Corps, and FNMA. As here, the plaintiffs obtained a loan from IndyMac, secured by a deed of trust in which MERS was the beneficiary, "acting as nominee for the lender, Indy[M]ac." (*Herrera*, *supra*, 205 Cal.App.4th at p. 1499.) In July 2008, the assets of IndyMac were transferred to FDIC, as conservator for IndyMac Federal. In March 2009, IndyMac Federal was placed in receivership and its assets subsequently sold to OneWest. (*Ibid.*) "MERS, as nominee beneficiary for IndyMac Federal," thereafter assigned the deed of trust to OneWest. (*Ibid.*) OneWest then appointed Trustee Corps as the trustee. Trustee Corps eventually sold the property

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[5] As Ochoa also points out, the Supreme Court is currently considering the question whether, in an action for wrongful foreclosure, the borrower has standing to challenge an assignment of the note and deed of trust on the basis of defects allegedly rendering the assignment void. (*Yvanova v. New Century Mortgage Corp.* (2014) 226 Cal.App.4th 495, review granted Aug. 27, 2014, S218973.) Ochoa requested that we await the Supreme Court decision before deciding this case. We deny his request.

at a nonjudicial foreclosure sale to FNMA. (*Id.* at pp. 1499-1500.) The plaintiffs argued that MERS's assignment of the deed of trust to OneWest was invalid because IndyMac had previously been dissolved and MERS did not have an agency agreement with IndyMac Federal or FDIC. (*Id.* at p. 1502.) They further argued that because the assignment to OneWest was invalid, OneWest did not have the power to substitute Trustee Corps as the foreclosing trustee. (*Id.* at p. 1506.)

The Court of Appeal rejected the plaintiffs' arguments because the "plaintiffs agreed in the [deed of trust] that MERS had the right to exercise all rights of the lender, including foreclosing on and selling plaintiffs' property." (*Herrera*, *supra*, 205 Cal.App.4th at p. 1505.) The facts that IndyMac had been "dissolved" and that MERS had no agency agreement with either FDIC or IndyMac Federal had no effect on the validity of MERS's actions as the beneficiary. (*Ibid.*)

In executing the deed of trust, Ochoa, like the borrowers in *Herrera*, agreed that MERS, as nominee for IndyMac and its successors and assigns, held the beneficial interest in the deed of trust with all the rights attendant thereto. The fact that the original lender, IndyMac, had been closed and placed under FDIC conservatorship prior to the MERS assignment does not affect MERS's power to act as the beneficiary. Either IndyMac maintained its interests in the note and deed of trust at the time of the assignment or those interests had passed to a successor or assignee. Under either scenario, MERS continued as the beneficiary under the terms of the deed of trust with the power to exercise the Lender's rights. Thus, even if IndyMac had, as Ochoa stated, ceased to exist, MERS still had the authority to assign the deed of trust to OneWest. The fact that the assignment stated that it was made by MERS "as nominee for [IndyMac]" without referring to IndyMac's successors does not affect MERS's power to make the assignment or its validity. (See *Herrera*, *supra*, 205 Cal.App.4th at p. 1505 [assignment as nominee for IndyMac Federal was valid despite its postdating the alleged receivership of IndyMac Federal]; *Ghuman v. Wells Fargo Bank, N.A.* (E.D.Cal. 2013) 989 F.Supp.2d 994, 1001 [the fact that the lender "became defunct" prior to MERS's assignment of deed of trust does not affect MERS's authority to act under the deed of trust.].)

The *Herrera* and *Fontenot* courts also pointed out that the plaintiffs were "'required to allege not only that the purported MERS assignment was invalid, but also that [the purported assignee] did not receive an assignment of the debt in any other manner.'" (*Herrera*, *supra*, 205 Cal.App.4th at p. 1505, quoting *Fontenot*, *supra*, 198 Cal.App.4th at pp. 271-272.) That is, the entity that appointed the trustee may have had the authority to do so regardless of the challenged assignment; the plaintiff must allege the lack of such independent authority. This requirement is particularly apt here. As Ochoa alleges, IndyMac's assets were transferred by the FDIC to IndyMac Federal and then sold to OneWest. Because Ochoa's loan was an asset of IndyMac, it follows that it was acquired by OneWest. In that case, OneWest would have had the right to appoint a trustee even if the August 2012 assignment from MERS to OneWest was defective. (See Civ. Code, § 2936 ["assignment of a debt secured by mortgage carries with it the security"]; see generally Bernhardt, Cal. Mortgages, Deeds of Trust and Foreclosure Litigation (Cont.Ed.Bar 4th ed. 2015) § 1.25, p. 1-22 ["the security follows the note, legally if not physically"].) Although Ochoa describes this chain of conveyances in his opening brief, he does not allege that OneWest somehow failed to acquire his loan in the process.

Even if the MERS assignment was defective and OneWest did not otherwise acquire Ochoa's loan, recent decisions have made clear that prejudice to a borrower from a defective assignment in the foreclosure process is not presumed. (See, e.g., *Herrera*, *supra*, 205 Cal.App.4th at p. 1507; *Fontenot*, *supra*, 198 Cal.App.4th at p. 272.) In *Fontenot*, the Court of Appeal rejected a wrongful foreclosure claim based upon MERS's unauthorized assignment of a promissory note. "Even if MERS lacked authority to transfer the note, it is difficult to conceive how plaintiff was prejudiced by MERS's purported assignment, and there is no allegation to this effect. Because a promissory note is a negotiable instrument, a borrower must anticipate it can and might be transferred to another creditor. As to plaintiff, an assignment merely substituted one creditor for another, without changing her obligations under the note. Plaintiff effectively concedes she was in default, and she does not allege that the transfer to [the assignee] interfered in

any manner with her payment of the note [citation], nor that the original lender would have refrained from foreclosure under the circumstances presented. If MERS indeed lacked authority to make the assignment, the true victim was not plaintiff but the original lender, which would have suffered the unauthorized loss of a $1 million promissory note." (*Fontenot, supra*, 198 Cal.App.4th at p. 272.) *Herrera* applied this reasoning to conclude that the plaintiffs could not establish prejudice even if the MERS assignment of the deed of trust to OneWest was void. (*Herrera*, *supra*, 205 Cal.App.4th at pp. 1507-1508.)

Like the assignment of the note in *Fontenot* and the assignment of the deed of trust in *Herrera*, the assignment of the deed of trust in this case had no effect on Ochoa's obligations under the note or deed of trust; regardless of the validity of the assignment, Ochoa still owed his debt. If MERS's assignment to OneWest was invalid, the "true victim" is the entity whose interest MERS purportedly assigned to OneWest. It is that entity, if any, that was harmed by the loss of its security interest in Ochoa's property. (See *Jenkins*, *supra*, 216 Cal.App.4th at p. 515.) If such a victim exists, it is not Ochoa.

For all the foregoing reasons, Ochoa has failed to show a reasonable possibility that he can allege a cause of action for wrongful foreclosure. The court did not, therefore, abuse its discretion in denying leave to amend.

B. *Slander of Title*

Ochoa contends he can allege facts sufficient to state a claim against Trustee Corps for slander of title. A slander of title claim requires the plaintiff to allege that the defendant, without a privilege or justification to do so, published a false statement that disparaged the plaintiff's title to property and caused the plaintiff direct pecuniary loss. (*Gudger v. Manton* (1943) 21 Cal.2d 537, 541, disapproved on another point in *Albertson v. Raboff* (1956) 46 Cal.2d 375, 381; *M.F. Farming Co. v. Couch Distributing Co., Inc.* (2012) 207 Cal.App.4th 180, 198; *Sumner Hill Homeowners' Assn., Inc. v. Rio Mesa Holdings, LLC* (2012) 205 Cal.App.4th 999, 1030.)

The relevant publications in this case are the notice of default, notice of sale, and the trustee's deed. Each of these implies that Trustee Corps had the right and power to

sell Ochoa's property at a foreclosure sale. Ochoa contends that such implications are false because Trustee Corps was never lawfully appointed trustee by OneWest because the MERS assignment to OneWest was invalid.

As explained in the preceding section, we reject Ochoa's premise that the MERS assignment to OneWest was invalid. In addition, even if the assignment was invalid and the challenged publications are factually untrue, Trustee Corps did not commit slander of title because the challenged statements are privileged.

Article 1 of division 3, part 3, title 14, chapter 2 of the Civil Code governs the procedures for nonjudicial foreclosure sales. Within that article, Civil Code section 2924 sets forth certain prerequisites, including the recording of a notice of default and notice of sale. Subdivision (d) of that section provides that the "mailing, publication, and delivery of [such] notices" and the "[p]erformance of the procedures set forth in this article" "shall constitute privileged communications pursuant to [Civil Code] [s]ection 47." (Civ. Code, § 2924, subd. (d)(1)-(2).) The privilege is a "qualified privilege"; that is, the offending statements will expose the speaker to liability only if they were made with "malice." (*Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 336, 341 (*Kachlon*).)

Malice for this purpose means "'"that the publication was motivated by hatred or ill will towards the plaintiff *or* by a showing that the defendant lacked reasonable grounds for belief in the truth of the publication and therefore acted in reckless disregard of the plaintiff's rights."' [Citations]." (*Kachlon, supra*, 168 Cal.App.4th at p. 336.) "'[M]ere negligence in making "a sufficient inquiry into the facts on which the statement was based" does [not], of itself, relinquish the privilege. "Mere inadvertence or forgetfulness, or careless blundering, is no evidence of malice." [Citation.] . . . [T]he negligence must be such as "evidenced a wanton and reckless disregard of the consequences and of the rights and of the feelings of others" [citation].' [Citations.]" (*Id.* at p. 344.)

Ochoa contends that Trustee Corps acted with malice in this case because it "lacked any reason to believe that it was the trustee [under the deed of trust]. It surely knew that IndyMac . . . did not exist at the time of the purported trust deed transfer to OneWest. [¶] Thus, malice is shown by [Trustee Corps]'s foreclosing when it knew a

trust deed transfer by an entity which did not exist could not be valid, thereby invalidating [Trustee Corps'] purported right to foreclose." We disagree.

Trustee Corps had reasonable grounds for believing that OneWest's appointment of it as trustee was valid based on either the MERS assignment (which was valid) or the fact that OneWest had acquired the assets of IndyMac. Indeed, the *Herrera* decision, which also involved a MERS-to-OneWest assignment and OneWest's appointment of Trustee Corps as trustee, was decided before OneWest appointed Trustee Corps as the trustee in this case. Trustee Corps was necessarily aware of, and could rely on, that decision in concluding that its appointment as trustee in this case was valid.

Because Ochoa has failed to allege facts sufficient to establish that Trustee Corps acted with malice in publishing the challenged notices and trustee's deed, he has failed to show a reasonable possibility that he can allege a cause of action for slander of title. The denial of leave to amend such a claim was, therefore, not an abuse of discretion.[6]

DISPOSITION

The order dismissing Trustee Corps and the judgment in favor of FNMA are affirmed. Trustee Corps and FNMA shall recover their costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

MOOR, J. *

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[6] In his opening brief, Ochoa argued that he could assert a claim based upon the Real Estate Settlement Procedures Act, or RESPA (12 U.S.C. § 2601 et seq.). He withdraws this argument in his reply brief. We do not, therefore, consider it.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.